Supreme Court of the United States

OCTOBER TERM, 1964.

No. 345

STATE OF MARYLAND for the use of NADINE Y. LEVIN, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

STATE OF MARYLAND for the use of SYDNEY L. JOHNS, *et al.*,

Petitioners,

v.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF PETITIONERS.

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The opinions of the United States Court of Appeals for the Third Circuit in this case are officially reported in 329 Fed. 2d 722 (R. 709). The opinion in the district court (Pittsburgh), including findings of fact and conclusions of law, is officially reported in 200 F. Supp. 475 (W. D. Pa. 1961) (R. 691).

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1). Petitioner's application for re-hearing in the Court of Appeals below was timely filed on April 15, 1964 and was denied on April 28, 1964. By order dated June 23, 1964, this Court extended the time herein for filing a petition for a writ of certiorari to and including September 25, 1964, which petition was filed in this Court on August 3, 1964 and granted by order of this court dated October 19, 1964 (R. 734).

Jurisdiction of this court is invoked on the grounds that the Court of Appeals below has rendered a decision diametrically opposed to the earlier and unanimous decision in the companion cases of the United States Court of Appeals for the District of Columbia on the same facts and issues, which decision is reported in *State of Maryland for the use of Meyer, et al.*, v. *United States of America*, 322 Fed. 2d 1009, *cert. den.* 375 U. S. 954 (1964). The *Meyer* decision held that McCoy as "caretaker" pilot of an aircraft owned and maintained by the United States (although allocated to the Maryland National Guard), was a civil employee of the United States within the meaning of the Federal Tort Claims Act, whereas the decision below was directly to the contrary.

The decision below reversing the district court was by a divided court. The majority was split into two separately posited opinions by Judges Smith and Hastie with a dissenting opinion by Judge Staley. Judge Smith held McCoy was not a federal civil employee and, even if he were, was not acting within the scope of his employment. Judge Staley held he was and Judge Hastie "(did) not reach" that question. The court below has reached a conclusion that has the results in one court of appeals (*Levin*) denying liability on the part of the government for one set of claim-

ants (airline passengers' survivors) and another court of appeals (*Meyer*) finding liability on the part of the government for another set of claimants (airline pilots' survivors) even though the claims arise out of exactly the same set of facts.

The Court of Appeals below has rendered a decision in conflict with the decisions of the Courts of Appeals of five different Circuits on the same federal question. The Court of Appeals below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's powers of supervision. The Court of Appeals below has decided important questions of federal law which have not been but should be passed upon by this Court. That all of the foregoing grounds are within the purview of Rule 19(1) of the Rules of the Supreme Court governing review by this court on certiorari and the grounds therefor.

Statutes and Regulations Involved.

1. The pertinent provisions of the Federal Tort Claims Act (28 U. S. C. §§28, 1346(b), 2671) are set out in Appendix hereto page A-1. Section 1346(b) provides that the United States shall be liable:

> ". . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment; under circumstances where the United States, *if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*" (Emphasis supplied.)

2. The National Defense Act of 1916 (39 Stat. 166) as amended, now the National Guard Act of 1956 provides in pertinent part 32 U. S. C.:

"Section 709. Caretakers and clerks.

(a) Under such regulations as the Secretary of the Army may prescribe, funds allotted by him for the Army National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Army National Guard. Under such regulations as the Secretary of the Air Force may prescribe, funds allotted by him for the Air National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Air National Guard. A caretaker employed under this subsection may also perform clerical duties incidental to his employment and other duties that do not interfere with the performance of his duties as caretaker.

(b) Enlisted members of the National Guard and civilians may be employed as caretakers under this section. However, if a unit has more than one caretaker, one of them must be an enlisted member. Compensation under this section is in addition to compensation otherwise provided for a member of the National Guard.

* * * * * *

(d) Under regulations to be prescribed by the Secretary concerned, one commissioned officer of the National Guard in a grade below major may be employed for each pool set up under subsection (c) and for each squadron of the Air National Guard. Commissioned officers may not be otherwise employed under this section.

* * * * * *

(f) The Secretary concerned shall fix the salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them. Aug. 10, 1956, c. 1041, 70A Stat. 614."

There are additional pertinent parts of statutes and regulations showing the close federal control over McCoy

and the federal maintenance of federal aircraft which will be found in the Petitioner's Appendix to this brief. These are the following:

National Guard Act, 70A Stat. 597-600, 32 U. S. C. 102, *et seq.*, (Appendix, A-1).

National Guard Regulations No. 75-16; (Plaintiffs' Exhibit No. 15 (R. 634 Appendix, A-5).

National Guard Regulations No. 75-16, (superseded); Plaintiffs' Exhibit No. 16, (R. 641 Appendix, A-8).

Air National Guard Regulations 40-01; Plaintiffs' Exhibit No. 17 (R. 652 Appendix, A-9).

ANGM 40-01, Air National Guard Manual; Plaintiffs' Exhibit No. 3 (R. 210 Appendix, A-11).

ANGR 50-01; Defendant's Exhibit No. 9 (R. 671 Appendix, A-13).

The following statutes are also set out in the Appendix hereto:

Federal Employees Compensation Act, 5 U. S. C. §751 (Appendix, A-14).

Maryland Annotated Code 1957, Article IA, sec. 10, "Collision of Aircraft". (Appendix, A-15).

Annotated Code of Maryland Art. 65, Sec. 11, 15 and 62 (Appendix, A-16).

Questions Presented.

1. Was Julius R. McCoy, who was employed on a full-time basis under the provisions of 32 U. S. C. §709 as a civilian caretaker of the federal property involved herein (a T-33 jet aircraft), an employee of the United States?

2. If McCoy as so employed was an employee of the United States, then, was the right of the United States to

control him at the time of the occurrence, such, that the United States, if a private person, under the *respondeat superior* law of Maryland, would be liable for his negligence herein under the Federal Tort Claims Act?

Statement of the Case.

A. Preliminary Statement:

These are actions under the FTCA against the United States for the wrongful deaths of the plaintiffs' decedents, Levin and Johns, who were passengers in a Capital Airlines Viscount airplane, which was struck in midair by a T-33 jet fighter plane owned and maintained by the defendant, United States, but which had been allocated to the Maryland Air National Guard, the 104th Fighter Interceptor Squadron, as part of the overall national defense plans of the Air Force through the National Guard Bureau, a federal agency. Both aircraft were destroyed and all of the passengers and crews killed except the pilot of the T-33 jet, Julius McCoy. The district court held that at the time of the accident McCoy was employed as a full-time civilian air maintenance technician under Sec. 709 (*supra*) as a caretaker of United States property, acting within the scope of such employment and that the United States was liable under the FTCA. The findings of the district court that McCoy was negligent and its allowance of damages were not disputed by the United States on its appeals from the judgments of that court and are not in issue here.

B. The proceedings below and in the companion *Meyer* cases:

The opinion and findings of fact and conclusions of law and judgments of the trial court, Gourley, Ch. J. were made on the record in the prior consolidated trials of the com-

panion *Meyer* cases in which Judge Mathews (District Judge, District of Columbia) after hearing testimony of witnesses in open court, including McCoy, had found that at the time of the accident McCoy was a civil employee of the United States acting within the scope of his employment within the meaning of FTCA. (Judge Holtzoff later overruled the Government's motion for reconsideration of this issue.) The transcript of the evidence and exhibits in the *Meyer* consolidated trials were received in evidence in the instant *Levin* cases by the district court in Pittsburgh. The findings of fact and law by Judge Mathews were also before that court. This virtually constituted the entire record on appeal before the Court of Appeals below.[1]

The United States, in the above-mentioned *Meyer* cases appealed to the Court of Appeals for the District of Columbia. The judgments in the *Meyer* cases holding that McCoy was a civilian employee of the United States acting in the scope of his employment at the time of the occurrence within the purview of the Federal Torts Claim Act, were unanimously affirmed in *United States to the use of Meyer* v. *State of Maryland*, 322 Fed. 2d 1009.

In the instant *Levin* cases, the United States had also appealed from the judgments in the district court in favor of the plaintiffs to the Court of Appeals for the Third Circuit. After the appeals in the *Levin* cases were argued and while decision therein was being awaited, the companion *Meyer* cases were affirmed on June 13, 1963. Certiorari therein was denied, December 16, 1963. It should be noted that in both the *Meyer* and *Levin* cases the Government's

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[1] By stipulation filed with this court, copies of the printed record on appeal in the *Meyer* case, pp. 17 to 688 were duly filed with this court, and together with the lower court decisions and reprinting of some exhibits, constitute the record on appeal before this court.

briefs and petition for a Writ of Certiorari were based upon identical points.

Copies of such *Meyer* decisions were immediately provided to the Court of Appeals below. Notwithstanding this, on April 1st, 1964 the court below handed down a split decision reversing the district court and directing that judgment be entered in favor of the United States. Thereafter the United States in the *Meyer* case moved this court for a conditional rehearing of its Petition for Certiorari, which motion is still pending and undetermined.

The Facts.

A. The underlying structure of federal statutes and regulations.

In accordance with its authority and policy as set out in 32 U. S. C. §§102 to 710, the United States owned, provided and maintained the airplanes, paid for the fuel, and provided all the equipment for the Maryland Air National Guard Unit based at Martin Field near Baltimore, directly paid the salaries of the civilian personnel employed to maintain such federal property, furnished the spare parts, and made the major repairs (R. 678; Dist. Ct. Find. 3).

The stated policy of the United States in purchasing and maintaining its military equipment (much of which is extremely complicated and costly such as the aircraft involved herein) even though allocated to the various State National Guards and of employing trained and qualified personnel as caretakers thereof, under its ultimate supervision and control as part of our uniform national defense scheme is illustrated by the National Guard Act as amended 32 U. S. C. §110 *et seq.* In addition to those quoted below the most pertinent sections appear in the appendix hereto at page A-1.

SECTION 102, "General Policy" provides in pertinent part:

> "In accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defenses of the United States be maintained and assured at all times. . . ."

SECTION 110 provides:

> "The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard. (Aug. 10, 1956, c. 1041, 70 A Stat. 600)."

Section 307 sets forth the procedure under which an officer of the National Guard obtains Federal recognition.

Section 314 (d) provides that the Adjutant General of each State "shall make such returns and reports as the Secretary of the Army or the Secretary of the Air Force may prescribe, and shall make those returns and reports to the Secretary concerned or to any officer designated by him." (Appendix hereto p. A-2) Sections 318 and 319 provide for special "federal Compensation for disablement during training" for a member of the National Guard. (Appendix hereto p. A-2). Sections 501 to 507 set out the requirements for training of the National Guard pursuant to Federal regulations.

Section 710 (Appendix hereto p. A-3) under subsection (a) provides that "All military property issued by the United States to the National Guard remains the property of the United States." Under subsection (c) it is provided that if the property ". . . was lost, damaged or destroyed through negligence, the money value of the property or

damage thereto shall be charged (1) to the State . . . concerned . . .; or (2) to the member to whom the loss, damage or destruction is charged from pay due him for duties performed in his status as a member of the National Guard." Under subsection (e) "If a State . . . neglects or refuses to pay for the loss . . . charged against it under subsection (c), the Secretary concerned may bar it from receiving any part of appropriations for the Army National Guard or the Air National Guard, as the case may be, until the payment is made."

It is to be noted that since the Federal government here made no attempt to charge or collect against the State of Maryland for the loss of the aircraft (R. 317), it further confirms the fact that the Federal government did not regard the admitted negligence of McCoy as the negligence of an employee of the State of Maryland or of a member of its Air National Guard.

Pursuant to 32 U. S. C. §709 (*supra*) the Department of the United States Air Force through the National Bureau adopted Air National Guard Regulation (ANGR) No. 40-01 with reference to the Air Technicians (Caretakers) employed under Title 32 U. S. C. §709 (Appendix, p. A-9) and delegated to the Adjutants General of the several States only a few duties within prescribed narrow limits subject to the provisions of law and any instructions issued by the National Guard Bureau (headquartered in the Pentagon). Said ANGR No. 40-01 specifically refers to the basic authority for the employment of Air National Guard civilian personnel as being contained in Section 90, National Defense Act, as amended, which was a forerunner of 32 U. S. C. §709 (R. 655-660).

The Department of the Air Force, under authority of the Secretary, adopted Air National Guard Manual (ANGM)

40-01 (R. 210), to govern all Air National Guard civilian employees (except those hired wholly from State or service contract funds) and to provide the staff and operating personnel with the titles, grades, job numbers and duties of civilian personnel in the Air National Guard (R. 210-218). This Manual spells out the authority of the National Guard Bureau of the United States to regulate the employment and rates of compensation of the civilian personnel and points out that such authority is contained in "Department of the Army General Order 96, dated 9 November 1951, subject "Delegation of Authority for the Employment and Fixing of Salaries for All Caretakers and Clerks in the National Guard Bureau." The Manual also contains a description of the duties and qualifications of an Aircraft Maintenance Chief and a Maintenance Supervisor (R. 214-218, Dist. Ct. Find. 5, 6) which McCoy was.

Thus, by Act of Congress, by a General Order of the Department of the Army, by Regulations of the Secretary of the Air Force and by the Manual of the National Guard Bureau, adopted by the order of the Secretary of the United States Air Force, the United States:

1. Provided for spending of Federal money for the compensation of competent persons "to care for material, armament and equipment of the Air National Guard. . . ."

2. Designated the civilian caretaker jobs for maintenance of federal equipment and positions held by Julius R. McCoy (Acting Maintenance Supervisor and Aircraft Maintenance Chief), prescribed the duties and requirements of the jobs, the prerequisite technical training and qualifications for such employment and required that their equipment be maintained and operated in accordance with standards prescribed by the United States Air Force.

B. McCoy's training, employment and supervision by the United States as a civil technician-caretaker pursuant to its statutory structure.

In order to qualify as such air technician (caretaker), McCoy, by order of the Secretary of the Air Force, attended a nine month course for maintenance officers at the United States Air Force Base and Maintenance School at Chanute Air Force Base, Illinois. While attending this school, he was paid by the United States Air Force finance office (R. 43; Dist. Ct. Find. 7).

General Wilson, Deputy Chief of the National Guard Bureau, testified that Captain McCoy was employed on a full time basis in June 1956, under the authority of §709, (R. 330), and Captain McCoy agreed that this Statute described his civilian job (R. 81; Dist. Ct. Find. 7, 8, 9)

ANGM 40-01; p. 107, describes the job of Aircraft Maintenance Chief (R. 218). The job of Maintenance Supervisor is described in ANGM 40-01, p. 105 (R. 216-217).

In June, 1956, when McCoy became a full time Federal air technician-caretaker, with the title of Base Maintenance Supervisor, he was a First Lieutenant in the 104th Fighter Squadron of the Maryland Air National Guard (R. 37-38, Dist. Ct. Find. 13). On May 16, 1958, his job status was changed with Federal approval to Aircraft Maintenance Chief on orders from Col. Victor Kilkowski, Base Detachment Commander (R. 47) who was also employed in a civilian capacity under Sec. 709 and was McCoy's immediate supervisor. As air technician, Aircraft Maintenance Chief, and Acting Maintenance Supervisor, his civilian caretaker jobs, McCoy was employed as an air technician during a normal work week, from 8:00 A. M. to 4:30 P. M., Tuesday through Saturday, except two Saturdays a month, when he would be in his military status during the specified military training period as an officer

in the Air National Guard and as Squadron Maintenance Officer (R. 38). The accident happened on a Tuesday, when McCoy was working on his civilian job (R. 77-78, Dist. Ct. Find. 11, 12, 13).

McCoy was also an officer with the rank of Captain in the United States Air National Guard (ANG) assigned to the 104th Fighter Interceptor Squadron, a federally recognized unit of the ANG of the State of Maryland and had a flying status (R. 37, 38, 41).

At the time of the accident, in addition to carrying out his duties as Aircraft Maintenance Chief, McCoy was acting Maintenance Supervisor (civilian) for the Base in the absence of Major Mitchell, who was away on a training program (R. 40, 48, 71; Dist. Ct. Find. 11). The job description for the position of Maintenance Supervisor provides that it is "desirable" that the incumbent be a rated pilot on flying status to enable him to "make test flights on assigned aircraft" (R. 217; Dist. Ct. Find. 18). In accordance with Air Force Regulations, McCoy as part of his civilian duties flew frequent check flights, supervised maintenance of twenty-eight aircraft, and other equipment owned by the United States, and the seventy-five to eighty civilian maintenance personnel (R. 37, 38, 40, 47, 58, 59, 68, 70, 71, 81, 306, 605; Dist. Ct. Find. 12) and as required by Air Force Regulations, submitted monthly equipment reports to the National Guard Bureau in Washington (R. 43).

The United States provided the buildings, equipment, parts for the equipment and funds for the payment of civilian employees and military members of the unit (R. 311-312). McCoy and other technicians were instructed under an Air National Guard Regulation of the United States Air Force that they were subject to the *Hatch Act* (R. 143), which applies to employees of the United States. To insure that the unit operated the equipment in accord-

ance with standards prescribed by the United States Air Force, an Air Force officer on active duty with the United States Air Force was stationed at Martin Field (R. 330; Dist. Ct. Find. 9) and Air Force Inspection Teams made inspections (R. 307; Dist. Ct. Find. 10).

Aircraft maintenance procedures are set out by the United States Air Force (R. 315), and the responsibilities of Aircraft Maintenance Chiefs and Maintenance Supervisors are outlined by United States Air Force regulations, manuals and technical orders (R. 216-218, 382, 383; Dist. Ct. Find. 9).

McCoy, in his full-time civilian caretaker air technician job, was paid an annual salary in the sum of $7,500.00 by check drawn on the Treasury of the United States. Additionally, he was paid approximately $2,000.00 per year by the United States for his part-time military duties (R. 41; Dist. Ct. Find. 23) in the Maryland National Guard covering two Saturdays a month (Dist. Ct. Find. 13).

C. Flying and checking the performance of federal aircraft allocated to the Maryland Air National Guard which were required civilian duties of McCoy.

The purposes of the flights made by McCoy were often several fold. Any flight he made as an Aircraft Maintenance Officer was to evaluate the condition of equipment (R. 48, 70, 139, 140) and to insure proper maintenance of the equipment over which he had general supervision. It was part of McCoy's duties to make these flight performance checks as part of his air technician's civilian job (R. 75, 76, 77, 79, 402). These flight tests were made by McCoy in his civilian capacity (Dist. Ct. Find. 19 and 20).

General Wilson, head of the Federal Agency (National Guard Bureau) responsible for the promulgation of ANGM 40-01, testified that it was desirable for the maintenance

officer to have a flying status because a maintenance officer should be able to check his own airplanes; that if he were a squadron commander, he would insist that the maintenance officer be a rated pilot because he could do his maintenance job better if he flew planes he maintained; that the other pilots have a safer feeling if they know that the person doing the maintenance is also going to fly the airplane (R. 58, 59, 306). To same effect is the testimony of Col. Kilkowski (R. 605-6) and McCoy (R. 70-71). Col. Kilkowski was McCoy's immediate civilian superior.

Col. Kilkowski testified that as a maintenance officer, as Aircraft Maintenance Chief, and as a pilot, McCoy was more capable of analyzing maintenance problems than the average pilot (R. 169, 170), was required to make frequent flights and *that McCoy was required* to maintain his proficiency to fly for the reason that he had to flight-check aircraft (R. 138, 139, 559 Dist. Ct. Find. 22). A pilot can do air technician (civilian) work while flying the airplane (R. 163, 164). In fact, on April 8, 13, 23, 24, 26, May 4, 10, 15, 16 and 17, 1958, Captain McCoy had performed functional flight checks in his civilian maintenance job (R. 70).

Col. Kilkowski listed a variety of other things that McCoy would have been expected to observe as Acting Maintenance Supervisor and Aircraft Maintenance Chief, which he could better observe from the air. These were: (a) obstructions that might be on the runway; (b) exposed lips of runways that might cause an accident; (c) foreign object damage; (d) cleanliness of his ramp (a piece of wire on the runway or ramp can be sucked into and ruin a $100,000.00 jet engine); (e) condition of the airport; (f) efficiency of the tower personnel; and (g) whether the maintenance people are in front of the intake scoop when the aircraft is parked, and whether they are waiting until the plane stops before they insert the chocks (R. 140).

McCoy as Maintenance Supervisor, in the course of each flight, by the very nature of his function and duty, would be observing the product he was required to maintain for better maintenance, safer aircraft, etc. (R. 164, Dist. Ct. Find. 20).

McCoy also flew the airplanes to satisfy the requirements of Air Force Regulations (AFR) 60-2 and to increase his pilot rating. Although it was necessary initially to have a military status to fly one of the planes, a person flying a plane might be performing the duties of an air technician as McCoy frequently did (R. 162-164; Dist. Ct. Find. 16, 17). McCoy stated that in his capacity as an air technician he took his orders from Col. Kilkowski, and while in his military status, he took his orders from Major Scott, the Squadron Commander (R. 41, 42).

D. McCoy's continued civilian caretaker function, duties and work at the time of the accident.

On the morning of Tuesday, May 20, 1958, McCoy reported to the base and commenced work at the usual starting time on his regular full-time civilian caretaker job as Aircraft Maintenance Chief (R. 67, 68; Dist. Ct. Find. 26), and as Acting Maintenance Supervisor in Major Mitchell's absence (R. 77-78; Dist. Ct. Find. 11). Before the flight, he performed certain administrative duties, incidental to his civilian capacity, was carried on the roster in his air technician pay status, and ultimately was paid for that day by the United States Treasurer in this capacity (R. 77-78; Dist. Ct. Find. 26).

McCoy could only occupy one pay status at a time, either that of a civilian caretaker in maintenance work, or that of a member of the Air National Guard in a military capacity. When the accident occurred he was occupying his civilian pay status (R. 586-87, Dist. Ct. Find. 24).

At the time of the accident, McCoy had accumulated more than the number of flight training hours for which he could earn flight pay under the provisions of AFR 60-2 for the period in question. His flight on May 20, 1958, therefore, was not to earn flight pay (R. 135-6; Dist. Ct. Find. 25). He performed the duties of an air technician that day up to and including the occasion of the accident (R. 67, 78). At the time of the accident, he was flying in the capacity of a caretaker of Government property (R. 80; Dist. Ct. Find. 21 and 22).

As to the specific flight, which was authorized by Base Commander Kilkowski (R. 139), McCoy stated that his purpose was to check the quality control of the product he was maintaining, to evaluate the equipment as to its maintenance and to maintain proficiency. He had a better opportunity to observe the quality of maintenance of the equipment by flying the plane (R. 70, 399). During the flight, he watched the instruments, and observed that the plane was behaving properly, that there were no mechanical difficulties and that the instruments were functioning properly (R. 120; Dist. Ct. Find. 15).

The printed flight form (R. 209) for the flight involved in the occurrence was an all purpose form used for all flights regardless of the nature of the flight, including flights in connection with the maintenance of planes (R. 69; Dist. Ct. Find. 15). It was not a training mission (R. 80, 121, 136, 146-7, 152-3, 161-3, 586-7). The printed form referring to a "proficiency flight" has multiple purposes, including evaluation of maintenance of the equipment, which was a responsibility of McCoy in his employment under 32 U. S. C. §709(a) (Dist. Ct. Find. 20). During the course of the flight in question, McCoy checked the efficiency of the equipment and evaluated the quality of the

maintenance, and the purpose of his flight was part of his civilian maintenance function (R. 162, 493-495, 616; Dist. Ct. Find. 21, 22).

McCoy was accompanied on the flight by a passenger, Donald Chalmers, a member of the Maryland Army National Guard. Chalmers had been required to sign a release (R. 689) prior to the flight releasing *the United States* and the State of Maryland from liability due to "negligence, faulty pilotage, or structural failure of the aircraft" (R. 698; Dist. Ct. Find. 28).

E. Admissions and other conduct of the United States further indicating the federal employment relationship.

Subsequent to the occurrence, McCoy received benefits under the provisions of the Federal Employees' Compensation Act, 5 U. S. C. §751 (Appendix, p. A-14) which provides for payment of compensation by the United States to an employee of the United States injured "while in the performance of his duty." The facts and papers pertaining to McCoy's compensation claim (R. 224-230) were investigated and processed in the due course of, and as required by his employment by Col. Ebaugh, United States Property and Fiscal Officer for the State of Maryland, a Federal employee, on forms provided by the U. S. Department of Labor specifically used for caretakers-technicians (R. 240-241). After due investigation in accordance with his findings (R. 245) Col. Ebaugh in due course certified with emphasis as follows:

> "I certify that Julius R. McCoy was working as a Civil Employee of the United States at the time of injury and *not* as a member of the Maryland National Guard (R. 228).

McCoy's claim was then forwarded to Mr. Stasko, Acting Claims Examiner Supervisor of the Bureau of Employees Compensation, Department of Labor. Stasko testified that in the course of his work, he adjudicated claims such as McCoy's; that such cases were handled in the same manner as cases involving other employees of the United States Government, that certain basic forms were required in the processing of each claim (R. 187), and that in the case of National Guard employees, the Bureau required certification by the United States Property and Disbursing Fiscal Officer as to an individual's type of employment at the time of injury (R. 186-188). Stasko reviewed the claim of McCoy and adjudicated that McCoy was in the performance of his duty as an employee of the United States at the time of the accident. McCoy's medical bills incurred as a result of the accident were paid by the United States (R. 191).

Subsequently, at the request of the United States, and pursuant to Statute, McCoy executed an assignment to the United States under the provision of the Federal Employees Compensation Act. of his rights of action against Capital Airlines and others, and said assignment prepared by the United States, stated that he was employed by the Department of the Air Force as an Aircraft Maintenance Chief (Pilot) at the time of the occurrence (R. 227). The United States at no time offered testimony to show that a mistake or error was made by either Col. Ebaugh or the Department of Labor. McCoy did not fly following the occurrence because he had submitted a voluntary request to be removed from flying status. The decision to remove him from this status required the approval of the United States Air Force (R. 166).

General Wilson testified that the State of Maryland did not reimburse the United States for the loss of or the cost

of the airplane, nor did the Federal Government make any request for reimbursement nor contemplate making one (R. 317). In this connection it should be noted that under 32 U. S. C. §710(c), if property of the United States is destroyed through negligence the United States may make a charge or offset against the State involved. Although McCoy's negligence was admitted, the United States did not make a charge or offset against the State of Maryland. This is another indication that the United States regarded McCoy's act as that of its own servant and not that of a servant of the Maryland Air National Guard.

F. Other significant admissions by the United States in its briefs.

In its brief to the court below, the government in stating the "Questions Presented" said at p. 12:

> ". . . because he [McCoy] was also performing duties incident to his employment as a civilian employee. . . ."

In its brief to the Court of Appeals for the District of Columbia, the Government stated at p. 16:

> "Regardless of whether Captain McCoy was also acting in his civilian capacity, *the situation presented by this case . . .*" (Emphasis supplied.)

In its Petition for the Writ of Certiorari in *Meyer*, page 14, the Government states that the first question is:

> ". . . whether *civilian personnel* of the National Guard are 'employees of the United States'." (Emphasis supplied.)

Again at page 27 of the aforesaid Petition, the Government states that the air technician, Captain McCoy, was

engaged at the time of the accident, in both flight training *and in maintenance activity:*

> "Thus, it would be wholly unreasonable to make the liability of the United States turn upon whether, at the time of the accident, the air technician is engaged in flight training, in maintenance activity, or (like Captain McCoy) in both."

G. The Air National Guard.

The overall purpose of the National Guard is to provide a pool of combat ready reserve forces to be used in case of an emergency involving the defense of the United States 32 U. S. C. Sec. 102. The National Guardsmen are required by 32 U. S. C. Sec. 312 to take an oath of office when they become members of the National Guard, to obey the President of the United States as well as the Governor of the State and to uphold the Constitution of the United States.

The organization of the Air National Guard and the composition of its units is the same as that prescribed for the United States Air Force subject, in times of peace, to such general exceptions as the Secretary of the Air Force may authorize, 32 U. S. C. Sec. 104(b). The Air National Guard of the United States is composed of federally recognized units of the Air National Guard and members of the Air National Guard of the United States, who are also reserves of the Air Force, 10 U. S. C. Sec. 8077, which constitute the ready reserve of the Air Force, 10 U. S. C. Sec. 269 (b). An officer of the Air National Guard of the United States whose federal recognition as a member of the Air National Guard is withdrawn, automatically becomes a member of the Air Force Reserve, 10 U. S. C. Sec. 8352(b).

Formation of a state National Guard unit is initiated by the Secretary of the Air Force when he informs the

National Guard Bureau that there is a need for a particular type of unit. If inspection shows that a state unit has met Air Force requirements, a certificate of federal recognition is issued by the National Guard Bureau under authority of the Secretary of the Air Force. At that time the personnel and the unit become eligible for the receipt of federal support (Gen. Wilson R. 280, 281).

The National Guard Bureau located at the Pentagon, acts as a liaison for the Secretary of the Air Force with the various state units in the supervision of the training of the units and maintenance of federal equipment in conformity with procedures and standards prescribed by the Secretary of the Air Force. Its ranking officers are on active duty with the United States Air Force (Gen. Wilson R. 309, 311, 314; Kilkowski 559). An annual budget for the Air National Guard to cover material, parts, pay of personnel, etc. is prepared under the direction of the National Guard Bureau and submitted for Congressional approval (Gen. Wilson R. 286, 287).

The qualification and requirements for officers in Air National Guard units are prescribed by Air Force Regulations and Air National Guard Regulations. If the applicant is found to meet the qualifications by a Federal recognition board, his application is forwarded to the Chief, National Guard Bureau, who forwards it to the Secretary of the Air Force. If Federal recognition is not extended, the unit would have to get rid of the individual (R. 134, 288, 289, 562.)

A rated officer on flying status receives additional compensation in the form of flight pay (R. 285, 292, 327), and his flying authorization comes from the National Guard Bureau (R. 299, 300, 307, 308, 322, 327, 337, 559). The regulations of the Air National Guard governing the training and activities of the units are promulgated by the National

Guard Bureau, as a part of the United States Air Force (R. 314, 322) and are similar to and as fully as practicable, embody the regulations governing the United States Air Force (R. 322). As a pilot, Captain McCoy was required to fly his aircraft subject to the provisions of Air Force Regulations 60-16 (R. 130, 544, 545).

The United States determined the amount of pay for all of the National Guard on military duty (R. 125, 126, 128) and the number of hours required (R. 127, 220). The Federal Government furnishes the funds for recruiting personnel for the National Guard (R. 316). The State of Maryland made no contributions for the costs of the 104th Squadron (R. 335) and only 25% of the costs of some minor services such as janitorial (R. 335).

The Air National Guard had some twenty-four wings of which seventy-three squadrons were equipped with jet fighters. All of these units had a D-Day Mission with a major command in the Air Force (Gen. Wilson R. 321).

The Air National Guard operates at large without regard to state boundaries. According to Standing Operating Procedure No. 3, promulgated January 2, 1957, (Defendant's Ex. 3, R. p. 663), the local flying area for the 104th Fighter Interceptor Squadron, included the States of Maryland, Pennsylvania, New Jersey, Delaware and Virginia.

The 104th Fighter Interceptor Squadron was a federally recognized unit and a part of the air division at Andrews Air Force Base. As such, it had been given a D-day mission with the Air Defense Command in the role of fighter interceptor squadron for which it was trained and equipped. In case of emergency or requirement by the Air Force, the 104th was required to be able to get at least fifty percent of its aircraft fully armed in the air in the first hour (Gen. Wilson R. 333).

H. Findings of the district court on the federal employer-employee relationship.

The underlying facts as hereinbefore outlined at subdivisions (b) to (e) were as found by Chief Judge Gourley who made 34 detailed findings of fact that show both the extent of control by the Federal government and the right to control (R. 692). It is sufficient at this point to refer by way of summary only to a few of the principal findings:

That the aircraft operated by McCoy was owned by the United States and allocated to the Maryland Air National Guard. That the United States paid all operating and maintenance costs, including the salaries of all civil and military personnel. (Finding 3). That at the time of the accident McCoy was employed as a full-time civilian air technician (Aircraft Maintenance Chief and Acting Maintenance Supervisor), and was paid directly by the U. S. Treasurer, pursuant to §709(a) (Findings 4, 5, 11, 12, 13 and 23); that at the time of the occurrence, McCoy was the only officer in aircraft maintenance at the base (Finding 11); that he was employed during the normal work week from 8:00 A. M., to 4:30 P. M., Tuesday through Saturday except 2 Saturdays a month when he was on duty in his status as a military member of the Maryland Air National Guard (Finding 13); that the accident occurred on a Tuesday, when McCoy was working in his civilian capacity (Finding 13); that McCoy applied to his immediate superior Kilkowski, a civilian employee and received permission to make the flight (Find. 15), which flight was a part of McCoy's job as civilian caretaker technician to check the proficiency of the aircraft's condition and maintenance (Findings 17, 18, 19, 20, 21, 22 and 24); that during the course of the flight McCoy checked the efficiency of the aircraft and its equipment in order to determine if it was working properly and if the maintenance thereon was pro-

perly performed (Finding 21); that on May 20, 1958, he commenced work on his full time civilian caretaker job and before the flight, he performed certain of his daily civilian administrative duties; that at the time of the occurrence, he was recorded as working in a civilian capacity as an air technician and was ultimately paid by the United States in this capacity (Finding 26); that following the accident, he applied for benefits as a civil employee of the United States under the Federal Employees' Compensation Act (Finding 29); that it was determined by the Base Detachment Commander, by the United States Property and Fiscal Officer for the State of Maryland and by the Department of Labor, that he had been injured while in the course of his employment as a civil employee of the United States and not as a member of the Maryland Air National Guard, and compensation benefits were, therefore, adjudicated on his behalf (Findings 30, 31, 32, 33); and finally the district court found:

> "34. In operating the airplane at the time of the occurrence, Captain McCoy was carrying out his civilian work as Aircraft Maintenance Chief and Acting Maintenance Supervisor of the Base, and therefore, was a civil employee of the United States acting within the scope of his employment."

The court also concluded as matter of law and fact that:

> "1. A person employed as an air technician (caretaker) in a nonactivated National Guard unit is an employee of the United States within the meaning of the Federal Tort Claims Act.
>
> 2. Captain Julius R. McCoy at the time of the accident was an employee of the United States acting within the scope of his employment within the purview of the Federal Tort Claims Act." (R. 707)

It should be noted that Judge Gourley's findings of fact and conclusions of law were practically the same as Judge Matthews in the *Meyer* case (R. 679-687) unanimously affirmed by the District of Columbia Court of Appeals, and which were also approved by Judge Staley in his vigorous dissent in the Court of Appeals below.

The Opinions of the Court of Appeals Below.

The majority below reversed the district court on the facts and the law. Judge Smith held that as a matter of law McCoy was not a civil employee of the United States and concurring Judge Hastie did "not reach" the question. In arriving at his conclusion Judge Smith specifically rejected a long line of appellate cases holding that a civil technician-caretaker was an employee of the United States. Judge Smith's reasoning rested essentially upon an assumption that military members of Air National Guard not called into service by the Federal Government are state rather than federal employees, which assumption was based upon his interpretation of the function of a militia under the federal constitution. However, Judge Smith failed to distinguish between military members of the National Guard and civilian caretakers employed under Sec. 709 to maintain federal property. As Judge Staley observed in his dissenting opinion (329 F. 2d 722, 732; R. 726):

> "On this question, historical and constitutional considerations as to the status of members of the National Guard are simply not relevant. For we are concerned with the status of Captain McCoy, not as a member of the National Guard, but *as a civilian caretaker* or air technician employed under 32 U. S. C. §709 (a) 'to care for material, armament, and equipment of the Air National Guard * * * '

which is property of the Federal Government." (Emphasis supplied.)

Judge Smith also cited some cases which held that members of the National Guard were state employees, finding no significance that in all these cases there were no civil technician-caretakers involved.

Judge Staley disagreed (p. 733):

> "Hence, in ordinary circumstances, members of the National Guard would be considered Federal employees because substantial elements of control over them are vested in the United States. However, because of the constitutional provision with respect to the militia, several cases have held that members of the National Guard who have not been called into active service are state and not Federal employees. See the cases cited in the majority opinion. I have already indicated my disagreement with that conclusion. But, *in any event, there is no such constitutional or statutory provision with respect to civilian caretakers.* Accordingly, in determining their employment status an analysis of the incidents of employment is of critical significance. As has been previously indicated, such an analysis of McCoy's status as a civilian caretaker of Federal property leads to the ineluctable conclusion that, in this capacity, he was an employee of the United States." (Emphasis supplied.)

But Judge Smith then went on to compound his error. He stated that "even if we assume that Captain McCoy, in his civilian capacity, was an employee of the United States" he was nevertheless acting in his military capacity (p. 729).

Judge Smith then proceeded to make his own finding of fact that McCoy was on a "training flight" in his (military) capacity as an officer of the Maryland Air National Guard, and treated the mass of uncontradicted evidence to the con-

trary and the various governmental admissions as irrelevant.

Judge Hastie, concurring in result, agreed with this finding but said (p. 732):

> "I join in the decision reversing the judgment of the district court, but without expressing any opinion upon that portion of the disagreement between my colleagues which concerns the status of civilian aircraft maintenance workers employed to care for federally owned planes while in the custody of National Guard units."

In making this new finding of fact, Judge Smith declared at page 723 that he was not bound by the "clearly erroneous test" of Rule 52 (a) of the Federal Rules of Civil Procedure, on the ground that the record was not made in the United States District Court in Pittsburgh but in the United States District Court for the District of Columbia.

The dissenting opinion of Judge Staley wholly disagreed with the majority on the law and on the facts, and cited and followed the decision in the companion *Meyer* cases and the decisions in the "caretaker" cases. Judge Staley affirmatively found it "abundantly clear" (p. 732) that in law and in fact McCoy was a civil employee of the United States acting in such capacity at the time of the accident.

SUMMARY OF ARGUMENT

I.

The United States is liable under the FTCA for the negligence, within the scope of his employment, of a civilian air technician caretaker of federal property.

The divided Court of Appeals below is in direct conflict on the law and findings of fact with the prior decision on the same record of the Court of Appeals for the District

of Columbia in the *Meyer* cases, and with a long series of decisions. This Court should act in accordance with these decisions and settle the rule in keeping with the spirit and intent of the federal statutes and regulations and the underlying factual structure and hold that a maintenance-caretaker employed under 32 U. S. C. §709 is an employee of the United States within the purview of the FTCA.

A. Civilian Air Technician-Caretakers employed pursuant to 32 U. S. C. §709 are employees of the United States within the purview of the FTCA.

McCoy was employed as a full time civilian maintenance technician under the specific direction and authority of federal statutes and regulations. The structure of federal statutes and regulations govern the detailed training, qualifications, performance, standards, hours of employment and rates of pay for a caretaker of federally owned military equipment (in this instance aircraft of an Air National Guard fighter squadron). All costs of maintenance and operation of the aircraft were borne by the federal government. McCoy was paid directly by the Treasurer of the United States. The federal statutory and regulation arrangement is supported herein by a mass of essentially uncontradicted evidence establishing that in fact there is detailed supervision and control of every phase of his work by the United States, and that the role, if any, of the State of Maryland, is nominal.

The fact that McCoy was also a member of the Air National Guard of Maryland is immaterial. There is nothing in the Constitution or in composition of the National Guard that places a civil caretaker of federal property in the same status vis-a-vis the federal government as a military member. A long line of "caretaker" decisions from

the *Holly* case, 192 F. 2d 221, to the decision in the companion *Meyer* cases supports this view.

B. McCoy was acting within the scope of his civilian employment as a technician-caretaker at the time of the accident.

The uncontradicted testimony of McCoy and his superior, Kilkowski, establish that at the time (Tuesday) of his operation of the aircraft, McCoy was performing maintenance checks on the aircraft as a part of his duty and function as a civilian air technician and during his regular employment hours as such. His military duties were performed on two Saturdays a month. The defendant has admitted that McCoy was, at least in part, performing this civil function. Even if McCoy were performing a dual function the United States would nevertheless be liable under the applicable *respondeat superior* law of the State of Maryland. McCoy's status as an "employee" meets all of the indicia of "right of control" by the United States within the meaning of the FTCA. Under the Maryland law a person can be acting at the same time for two employers.

The abundant evidence herein is supported by the strong presumption (unrebutted) under the law of Maryland, the place of the accident, that the United States' owned plane was being operated by its agent or servant acting within the scope of his employment. This presumption alone is sufficient.

C. The employment certification and adjudication by agencies of the United States as admissions against interest.

Additionally, there are significant admissions made by defendant (1) through its employee, Colonel Ebaugh, on active duty for the United States as United States Property

and Fiscal Officer for the State of Maryland, and (2) by the Bureau of Employees' Compensation, Department of Labor, in their findings duly made in the regular course of their employment that McCoy was acting as an employee of the United States when injured. Defendant's briefs below have admitted that McCoy at the time had at least a dual function in his civilian and military capacities.

D. The court was in error when it made a finding of fact that McCoy was engaged in a "training flight" as a Military officer contrary to that made in the district court below and disregarded the "unless clearly erroneous rule" of Rule 52a F. R. C. P.; that said new finding was unsupported by and contrary to the evidence.

The majority judges grasped at the use of a flight authorization form (R. 209) which contained the generalized words "flying proficiency" as indicating this was a training flight; but each overlooked the uncontradicted testimony that this broad general term included the flying *proficiency of the aircraft* and its operation by a civilian maintenance technician-pilot in the course of his duties as such, and that this was the purpose of the flight which was not a pilot training flight. (McCoy—R. pp. 70, 71, 80, 120, 124, 493, 494; Kilkowski—R. 136, 138, 140, 146, 587, 605, 606, 616; Gen. Wilson—pp. 58, 59, 306.) It is respectfully submitted that the making of a new finding of fact by an appellate court contrary to uncontradicted evidence, the Maryland presumptions and the admissions by the defendant is a tenuous ground upon which to rest an otherwise unsupported decision of reversal with its attendant wide repercussions. In any event the United States would still be responsible under the *respondeat superior* rule of Maryland.

II.

Assuming but not admitting McCoy was engaged in some military training activity at the time of the occurrence the United States is nevertheless liable.

The 104th Fighter Squadron of the Maryland Air National Guard is clearly part of our national defense system rather than a state military force. The selection, training and appointment of McCoy as a Captain pilot by the Secretary of the Air Force, is actual and detailed under federal statutes and regulations, whereas the interest and function of the state particularly in an activity of this kind is nominal. In law and in fact the operation and control of members of the Air National Guard reside in the United States. The declared policy of the United States is to regard the National Guard as part of its National Defense System and that all military property issued to the National Guard remain the property of the United States.

Whereas in fact the State of Maryland has its own statutory provisions for its separate military force which it designates as the "Maryland State Guard".

III.

The prior *Meyer* decision operated as a collateral estoppel.

The Government became collaterally estopped by the prior final judgments in *Meyer* cases on the common issue of liability.

ARGUMENT.

I.

The United States is liable under the Federal Tort Claims Act for the negligence within the scope of his employment of an air-technician civilian caretaker of federal aircraft.

A. Civil air technician-caretakers employed pursuant to 32 U. S. C. §709 are employees of the United States within the purview of the FTCA.

The FTCA being remedial it should be liberally construed. *United States* v. *Yellow Cab Co.*, 340 U. S. 543 (1951).

The combined structure of Federal statute and regulations embody the basic authority for the employment of National Guard Civilian Caretaker personnel. This structure shows that the ultimate control and right of control over the civilian caretaker personnel remains in the United States under the close and detailed supervision of the Federal air arm with respect to qualifications of personnel and standards of performance. This structure of federal employment, control and authority over McCoy is evidenced by an Act of Congress, (Sec. 709) by General Order 96 of the Department of the Army, Regulations of the Secretary of the Air Force (ANGR 40-01), and is supported in actual fact and practice by the detailed evidence herein with respect to federal control over McCoy's training, employment and duties as a civil caretaker of the federal aircraft of a fighter squadron, all demonstrated to be a part of a National Defense establishment.

The federal interest in maintaining its properties is again indicated by the specific provision of 32 U. S. C. §710 (a) which states:

"All military property issued by the United States to the National Guard remains the property of the United States."

It is respectfully submitted that the federal structure of statute and regulation, of detailed supervision over selection, qualifications and employment of McCoy and of his maintenance of its property establish United States employment of and control over McCoy. As the unanimous court held in *Meyer* (322 F. 2d 1009, 1012):

> "He (McCoy) was so employed to assist the National Guard, but also to assist the United States. In his property maintenance function he was paid by, and the ultimate right of control over him was in, the United States. The functions lodged by the United States in the State Adjutant General did not serve to supplant this right of control in the United States, though it may be said to have been ancillary thereto. Such supervision as was lodged in the State did not make Captain McCoy an employee of Maryland. A foreman, for example, is not the employer of the one whose work he may in some respects supervise. There is of course a close relationship between the State of Maryland and the United States in the maintenance of federal property allocated to the Maryland National Guard, but this does not tip the balance toward the State on the issue of employment; for too much begins and remains with the United States in the case of these caretakers of federal property."

McCoy met the criteria of master and servant under the law of Maryland. In *Keitz* v. *National Paving & Contracting Co.*, 214 Md. 479, 491, 134 A. 2d 296, 301, the Maryland Court of Appeals (1957) held that:

> ". . . it has been stated by this court that there are at least four criteria that may be considered

> in determining the question whether the relationship of master and servant exists. These are: "(1) the selection and engagement of the servant, (2) the payment of wages, (3) the power to discharge, (4) the power to control the servant's conduct, (5) and whether the work is a part of the regular business of the employer."

It has been demonstrated that all of these elements are present here, that ultimate authority to control all aspects of the employment relationship with respect to caretakers is vested in the United States. As was said in the *Meyer* opinion (p. 1014), citing the *Keitz* case in detail as noted above and saying further:

> "Not only was the Captain an employee of the United States but he was also 'acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law' of Maryland where the negligence occurred. A private person in Maryland is liable for the negligence of his servant in the circumstances set forth in *Keitz* v. *National Paving & Contracting Co.*, 214 Md. 479, 491, 134 A. 2d 296, 301 (1957)."

However, only Judge Smith of the majority judges below reached the issue of McCoy's federal employment. In reaching his decision Judge Smith specifically repudiated a long line of appellate court decisions uniformly holding that a technician-caretaker in a non-activated State National Guard unit is a federal employee within the purview of the FTCA. Judge Smith frankly conceded he was in conflict with the following caretaker decisions, viz.: *United States* v. *Holly*, 192 F. 2d 221 (10th Cir. 1951); *Elmo* v. *United States*, 197 F. 2d 230 (5th Cir. 1952); *Courtney* v. *United States*, 230 F. 2d 112 (2d Cir. 1956); *United*

States v. *Wendt*, 242 F. 2d 854 (9th Cir. 1957) and the *Meyer* decision. As justification for his view Judge Smith relied upon cases which are readily distinguishable since they did not involve caretakers. (These cases will be discussed later under this point.)

As was pointed out by Judge Staley in his dissenting opinion (p. 732):

> "On this, the vital question in this case, the majority candidly admits that each and every one of the reported cases is arrayed against it, for each of them holds that when acting in this capacity such a caretaker is an 'employee of the Government' within the meaning of the Federal Tort Claims Act. See the cases cited in the majority opinion."

In the prior companion *Meyer* cases, the Court of Appeals for the District of Columbia expressly approved and followed the *Holly* line of caretaker cases. In *Meyer*, the court found abundant support in the record for holding that McCoy was a civilian technician caretaker in the employ of the United States and acting within the scope of his employment. There the court ruled (p. 1012):

> "We hold with the District Court that in his civilian capacity as a caretaker of property of the United States Captain McCoy when on this flight, which entailed the performance of his caretaker and maintenance duties, was an employee of the United States within the terms of the Federal Tort Claims Act. See *United States* v. *Holly*, 192 F. 2d 221 (10th Cir. 1951); *Elmo* v. *United States*, 197 F. 2d 230 (5th Cir. 1952); *United States* v. *Duncan*, 197 F. 2d 233 (5th Cir. 1952); *Courtney* v. *United States*, 230 F. 2d 112, 57 A. L. R. 2d 1444 (2d Cir. 1956); *United States* v. *Wendt*, 242 F. 2d 854 (9th Cir. 1957). He was so employed to assist the National Guard, but also to assist the United States."

After a detailed review of his duties the court properly found that the United States had the ultimate control over McCoy (p. 1013):

> "In his property maintenance function he was paid by, *and the ultimate right of control over him was in, the United States.*"

And at p. 1014:

> "The fact that this caretaker was also an officer of the National Guard with other duties in that respect did not remove him from the federal employee status while he was actually performing the duties incident to that status." (Emphasis supplied.)

In *Holly*, Maness, a member of the Oklahoma National Guard, was driving a jeep which struck Holly's automobile, causing injuries. At the time of the occurrence, Maness was employed as a "unit caretaker." In an action brought to recover damages for the injuries caused by the collision, the trial judge found in favor of the plaintiffs, and, on appeal, the only question presented to the court was whether Maness was an employee of the United States within the meaning of the FTCA. The reviewing court held that he was, stating that 32 U. S. C. §42 (now §709) authorizes the employment of caretakers for the care and maintenance of materiel, animals, armament and equipment belonging to the United States and assigned to the National Guard organizations; that these caretakers are paid from funds allotted by the Secretary of the Army for the support of the National Guard under regulations prescribed by the Secretary of the Army, and is in addition to any pay authorized for "members" of the National Guard; that National Guard Regulation No. 75-16, promulgated by the Secretary of the Army, (its Air Force counterpart is ANGR 40-01) delegates to the Adjutants General of the states authority to employ, fix rates of pay, establish duties, and to discharge caretakers, subject to instructions by the

Chief, National Guard Bureau. The court further noted that the regulations provide in detail the right of caretakers to annual leave, sick leave and military leave, including accumulation of annual and sick leaves. The court then held, page 223:

> "Thus the Federal statute creates the position of unit caretaker and generally outlines the duties. The pay for these services is wholly from Federal funds. The regulations define the duties and responsibilities in detail. The maximum pay scales are fixed by the Secretary of the Army, while actual rates of pay, within the limits fixed by regulation, are established by the State Adjutant General by virtue of the delegation of that power from the Secretary of the Army. The primary duties of the caretakers are the care and maintenance of Federal property assigned to the National Guard for military purposes. Through the State Adjutant General, *the Secretary of the Army and the Chief of the National Guard Bureau have complete control over the work of the caretaker, including his employment and discharge.* The Federal government maintains a reasonable measure of direction and control over the method and means of a caretaker's performing his service. There is present every element necessary to constitute a unit caretaker an employee of the United States." (Emphasis supplied.)

And in response to the argument of the government that Maness was a "member" of the National Guard, the court stated, page 223:

> "The fact that under the regulations the caretaker must be a member of the National Guard and perform duties for the State is immaterial. The injuries were caused while the caretaker was in the performance of his duties for the United States, not the state."

Holly was decided by the same court that decided *Williams* v. *United States*, 189 F. 2d 607 (10th Cir., 1951), relied upon by Judge Smith in this case. In the *Williams* case, which involved a "member" of the National Guard who was not also employed as a civilian caretaker, the court held that "members" of the National Guard, not in active federal service, are not employees of the United States.

In *Wendt*, where a U. S. Army truck and trailer was driven by Brown, a member of the Washington (State) National Guard who was also employed as Supply & Maintenance Technician (formerly "unit caretaker"), the Court was not led astray by the change in terminology, and stated, page 855:

> "At the time of the collision and at all pertinent times, Brown was a member of the Washington National Guard, but was also employed as a civilian administrative, supply and maintenance technician . . ."

The Court then pointed out in a footnote that such technicians (as Brown) were formerly called unit caretakers, but that Brown's employment and duties were similar to those of a caretaker involved in the *Holly, Elmo, Duncan* and *Courtney* cases. The Court then held that Brown was an employee of the United States at the time of the occurrence.

In *Elmo*, Lejeune, a Texas National Guard Supply-Sergeant was operating an army jeep and was also employed as a caretaker. Distinguishing its earlier decision in *Dover* v. *United States*, 192 F. 2d 431 (5th Cir., 1951) in which that same Court had held that a member of a State National Guard Unit, not called into active federal military service, was not an employee of the United States, the Court stated that it adhered to its former opinion, in the

Dover case, but recognized that it was not controlling in the *Elmo* case. And the distinction which the Court pointed out between the *Dover* and the *Elmo* cases is that Lejeune was not only a "member" of the National Guard, but, ". . . was also employed as a civilian unit caretaker of Company C" (p. 231).

It should be noted that the court found no constitutional inhibition in holding Lejeune a federal civil employee.

> "As to appellant's contention that the Court of Appeals for the Tenth Circuit in deciding the *Holly* case overlooked certain Constitutional limitations on the power of Congress, we think there is nothing in the Constitution inhibiting Congress from authorizing the hiring of a civilian employee to look after property belonging to the United States, assigned to a state National Guard unit" (p. 233).

In *Duncan*, an army truck, driven by Clark, struck the rear of another truck causing it to roll forward crushing Duncan between the two vehicles. The trial court found that at the time of the accident, Clark, while proceeding on a return trip from Camp Mabry, Texas, to Terrell, Texas where he had been sent to receive an Army vehicle for the Texas National Guard, was acting in the capacity of an employee of the United States, within the scope of his employment as a unit caretaker of United States government property assigned to the unit. This finding and the judgment of the trial court were affirmed on appeal.

In *Courtney*, an action was brought under the FTCA to recover damages allegedly caused by a unit caretaker of a National Guard unit. The court stated, page 113:

> "The sole issue on these appeals is whether a civilian caretaker employee of a federally recognized but non-activated National Guard unit is an 'employee' of the United States within the meaning

of the Federal Tort Claims Act, 28 U. S. C. A. §1346(b)."

In that case, Truex was a civilian caretaker of federal equipment loaned to the federally recognized, but non-activated, New York National Guard. The claims for damages arose out of his alleged negligent conduct in the operation of a Tank Retriever M-32. After pointing out that Truex was employed under 32 U. S. C. §42 (now 32 U. S. C. §709), which authorizes the employment of technician caretakers, under regulations of the Secretary of the Army, for the care and maintenance of United States property assigned to National Guard organizations, and after referring to National Guard Regulation No. 75-16, the court held, page 113:

> "The adjudicated cases appear to be unanimous in treating caretaker employees of non-activated National Guard units as 'employees' within the meaning of the Act. . . . However, these same courts hold that *members* of such units are not 'employees' within the Act."

The court stated further that it agreed with the decisions in *Holly, Elmo* and *Duncan.*

Martarano v. *United States,* 231 F. Supp. 805 (D. C. Nevada, July, 1964) is also applicable. This was an action against the United States based upon negligence under the FTCA. The alleged "employee", Sweeney, was employed by the Nevada Personnel Department for employment as Mammal Control Agent. Sweeney's wages were paid by the State of Nevada and his retirement plan was under the State of Nevada. But he was supervised by federal officials of the Fish and Wild Life Service. The court in ruling against the government held (pp. 807-808):

". . . the controlling principle is that responsibility follows right of supervision . . ." (citing cases).

"It is true that a determination of Sweeney's employment status, that is, whether he was a federal employee at the time of the collision, presents a question of federal rather than state law. . . . This does not mean, however, that only a person officially on a federal payroll may come within the definition of federal employee. The usual rules of *respondeat superior* are to be applied. This is plainly recognized by the statutory definition of employee of the government by apt words encompassing persons 'acting on behalf of a federal agency', temporarily or permanantly, 'whether with or without compensation.' "

To same effect, *Watt* v. *United States*, 123 F. Supp. 906 (N. D. Ark. 1954). See also Wright: *The Federal Tort Claims Act*, Central Book Company, Inc. 1957, p. 47.

In *O'Toole* v. *United States*, 206 F. 2d 912 (3rd Cir. 1953), the Court reversing the decision below, held that a military member of the District of Columbia National Guard was an employee of the United States within the meaning of the FTCA, even though it was not activated, citing the *Holly* and *Duncan* cases.

However Judge Smith preferred to rely upon *Williams* v. *United States*, 189 F. 2d 607 (10th Cir. 1951); *Dover* v. *United States*, 192 F. 2d 431 (5th Cir. 1951); *McCranie* v. *United States*, 199 F. 2d 581 (5th Cir. 1952), cert. den. 345 U. S. 922; *Storer Broadcasting Company* v. *United States*, 251 F. 2d 268 (5th Cir. 1958), cert. den. 356 U. S. 951; *Pattno* v. *United States*, 311 F. 2d 604 (10th Cir. 1962), cert. den. 373 U. S. 911. But none of these cases involved persons who were in fact civilian caretakers of federal properties as in the *Holly* line of decisions and as here. In the *Storer* case the court particularly noted this "caretaker" distinction.

In *Pattno*, which may be stressed by the defendant, the Circuit Court affirmed the findings of the Court below. The facts and the applicable law are readily distinguishable from the instant case. There, a mid-air collision between a Wyoming Air National Guard jet flown by Capt. Meckem and a private plane resulted in the death of Lewis, the private plane pilot. In a wrongful death action brought against the United States under the FTCA, recovery was denied by the trial Court on the ground that "the accident was not caused by the negligence of an employee of the United States while acting within the scope of his employment." The case turned upon the duties and scope of Captain Meckem. Lt. Anderson and Capt. Meckem were members of the non-activated Wyoming Air National Guard. Meckem was employed as an air technician flight-instructor pursuant to 32 U. S. C. §709, but not in a maintenance or caretaker capacity as to U. S. property and had no caretaker duties. Although Captain Meckem drew pay as an air technician, it is there that the superficial resemblance to McCoy ends. Captain Meckem's civil and military duties were concerned only with the military flight training of Air National Guardsmen and he was engaged solely in a military training formation flight, which was so found by the trial court and found further to have nothing to do with care or maintenance of the aircraft.

In its brief to the Appellate Court, in the *Pattno* case, the United States took great pains to make clear that Captain Meckem was not a "caretaker", and "had nothing whatever to do with the maintenance or care of government property used by the Air National Guard", and quoted the trial judge's holding that Captain Meckem "was not a caretaker within the meaning of the Act." Its brief then went on to say: "This holding, and the facts of this case place

it beyond the rule of *Holly* and similar cases." (Citing *Wendt, Courtney, Elmo, Duncan* and *Watt.*)

Judge Smith's resort to the historical and constitutional background is not well founded and is irrelevant in any event. He relied upon this in rejecting the "caretaker" distinction between the two lines of cases. His basic ground was that "The Maryland Air National Guard, although federally recognized, was an independent military force of the State of Maryland under the command jurisdiction of the Governor ——" citing the Maryland constitution and code and the National Guard Act, 32 U. S. C. §314, with particular focus on the role allegedly played by the Adjutant General of the Maryland Air National Guard. Judge Smith also cited *Harris* v. *Boreham*, 233 Fed. 2d 110, which is not apropos.[2] (But see *Holly* and *Meyer*, *supra*, on this point.)

It is respectfully submitted that Judge Smith's analysis disregards the basic federal statutory and regulatory structure and the supporting facts heretofore alluded to, and misconstrues the letter and spirit of the National Guard Act, while at the same time endowing the Maryland statutes (referring to the National Guard) with greater scope than can be reasonably attributed thereto. To begin with, the mere fact that under 32 U. S. C. section 702 (d) and section 710 the State bears a responsibility for the destruction of property by members of its State National Guard does not change the picture of federal ownership and the maintenance of its property by its highly trained civil techni-

[2] This case involved an action against the United States for personal injuries allegedly caused by a loose manhole cover in a street in St. Thomas, Virgin Island. The court held that the municipality of St. Thomas was not a federal agency of the United States; that the territory of Virgin Island was endowed with separate sovereign attributes granted by Congress and was a body politic distinct from the United States government.

cians, under such regulations as the secretary of the air force may prescribe (§709(c)).

The Federal Statute (32 U. S. C. Sec. 709), the Air Force Regulations (ANGR 40-01), and the ANG Manual (40-01) demonstrate that the Federal government and not the State of Maryland had the power and right to employ, fix rates of pay, establish work hours, supervise, and discharge the caretakers. Ultimate authority to control all aspects of the employment relationship with respect to caretakers is vested in the United States. These federal enactments and regulations establish that caretakers are employees of the United States. The United States delegates to the State Adjutants General, by virtue of ANGR 40-01 and related orders and regulations, this authority, in behalf of the United States, to employ, fix pay scales, establish work hours, supervise, and discharge civilian caretakers of federal property. The exercise of this authority so delegated by the United States to the State Adjutants General remains subject to control and limitation by the United States through further regulations and instructions issued by the Chief of the National Guard Bureau (ANGR 40-01), Sec. 1, paragraph 3(b) (R. 658). (*Holly, supra,* p. 35). The Maryland Codes pertaining to the National Guard are merely perfunctory and clearly subservient to the overriding Federal structure. (Appendix, p. A-15). Under Art. 65, Sec. 11 of the Annotated Code of Maryland (Appendix, p. A-15) the ultimate responsibility of the quartermaster general is to the Secretary of the Army to whom he must submit "returns of all federal property" as prescribed by said Secretary. Section 15(b) of the code specifically recognizes that the Air National Guard of Maryland shall consist of those units of the organized militia allocated to the State of Maryland by the Department of Defense.

Furthermore, an examination of Article 65 reveals that the State of Maryland itself recognizes its minor and nominal role in the National Guard when it provides under Section 62 for its own "Maryland State Guard" separate and apart from the National Guard.

> . . . "Such forces shall be additional to and distinct from the National Guard and shall be known as the 'Maryland State Guard.'" (Appendix, p. A-16).

See *United States* v. *Herting*, 48 F. Supp. 607 (D. C. S. D. Fla. 1943) in which the court noted that defendant was a member of the Maryland State Guard organized under Maryland law in 1943, and that it was a separate military organization from that of the National Guard.

As was held in the Meyer case:

> ". . . *The functions lodged by the United States in the State Adjutant General did not serve to supplant this right of control in the United States,* though it may be said to have been ancillary thereto. Such supervision as was lodged in the State did not make Captain McCoy an employee of Maryland. A foreman, for example, is not the employer of the one whose work he may in some respects supervise. There is of course a close relationship between the State of Maryland and the United States in the maintenance of federal property allocated to the Maryland National Guard, but this does not tip the balance toward the State on the issue of employment; *for too much begins and remains with the United States* in the case of these caretakers of federal property." (Emphasis supplied)

It may be added that Judge Smith also sought support from an alleged resemblance of government support of the National Guard to state aid such as in the Federal Highway Act. It is respectfully submitted that mere financial assis-

tance without the many other factors involved as in this case far from parallels the situation herein.

Defendant's legislative history argument.

The defendant has contended that there was an intention on the part of Congress not to include caretakers as employees of the government within the purview of the FTCA. This legislative history on the contrary demonstrates the Federal control of the National Guard and, more particularly of "Caretakers." Congress had many opportunities both before, at the time of the passage of FTCA, and, thereafter, to indicate its intention that "caretakers", were State employees if it chose to do so. As a matter of fact, since FTCA became a law in 1946, Congress has several times amended this Act, but has remained silent as to "caretakers" even in the face of the long lines of cases on the subject from 1951 to date. Obviously, Congress did not intend to remove "caretakers" from their recognized Federal status. Nor is recent congressional legislative history helpful to the defendant, as the court in *Meyer* noted. There Judge Fahy said (p. 1013):

> "The United States contends that Congress, since the events in this case, has rejected the effort to extend the coverage of the Federal Tort Claims Act to members and civilian employees of the National Guard. Reliance for this contention is placed upon 74 Stat. 878 (1960), 32 U. S. C. §715 (Supp. 1962) and its history, including H. R. Rep. No. 1928, and S. Rep. No. 1502, 86th Cong., 2d Sess. (1960), U. S. Code Congressional and Administrative News p. 3492 *et seq.* We can by no means agree with this contention insofar as it bears upon the status of persons employed as civilians under 32 U. S. C. §709. The Government's reference in its brief to the statement in the letter of the Deputy Attorney General to the Chairman of the Senate Committee

on the Judiciary, set forth in the Report, 'To divorce responsibility from control is to forego any rational legal basis for payment,' clearly misses the significance of the position of the Deputy Attorney General insofar as the present case is concerned. The thrust of his objection to the proposed legislation, S. 1764, 86th Cong., 2d Sess. (1960), which would have amended the Tort Claims Act as to both classes of persons, was that it would change existing law as to federal liability for acts of Guardsmen when on regular training duty under State control. As to the provision expressly including civilian caretakers under the term 'employees of the Government,' his position was that it was unnecessary because it would merely restate existing law.[4]

"This distinction between members of the National Guard and men employed pursuant to Section 709 appears also in the *Hearings Before Subcommittee No. 2 of the House Committee on the Judiciary,* 86th Cong., 2d Sess. Ser. 22 (1960), where the First Assistant, Civil Division, Department of Justice, with reference to Section 709 employees, made a statement in terms identical to those used by the Deputy Attorney General. *Id.* at 6 and 7. See note 4, *supra.*"

Judge Fahy further noted that the new statute, 74 Stat. 878, 32 U. S. C. §715 (Supp. 1962) did not detract from the remedies under the FTCA but merely "creates a limited administrative recovery [up to $5,000] as an alternative to the traditional judicial one under the Federal Tort Claims Act" (p. 1014).

The court is respectfully referred to footnotes 4 and 5 to Judge Fahy's opinion which cites the statements of the Deputy Attorney General and the Secretary of the Army, as supporting his views.

It is of sufficient importance here to quote the statement of the Deputy Attorney General as footnoted by Judge

Fahy. The Deputy Attorney General, also apparently referring to the *Holly* line of decisions, observed that he found the government's liability for acts of federalized National Guardsmen and section 709 employees as the same:

> The same rationale that looks to the controlling organization holds that when National Guardsmen are actually under the control, in whole or in part, of regular Army or Air Force officers or other Federal personnel, the Government is liable for their negligence. In such instances, however, the proposed legislation would be unnecessary, for the Government's responsibility already exists under the present provisions of the Federal Tort Claims Act.
>
> The provision which would expressly include within the definition of "employee of Government," civilian employees of the National Guard who perform caretaker functions with respect to the National Guard's military equipment, and are separately paid for such services under title 32, United States Code, section 709, is also unnecessary and thus objectionable, for the same reason. For it has already been held under the principles we have discussed in an unbroken series of court decisions that, because of the control relationship between such persons and the Federal Government (and its property), the latter is responsible for their torts under the present provisions of the Federal Tort Claims Act. (Senate Report, No. 1928.)

Judge Fahy said further:

> "However that may be, it is clear that as of the time here in question, 1958, the plaintiffs' remedy for injuries caused by civilian caretakers was under the Federal Tort Claims Act; and the history of this subsequent legislation supports this view. The fact that this caretaker was also an officer of the National

> Guard with other duties in that respect did not remove him from the federal employee status while he was actually performing the duties incident to that status" (p. 1014).

B. McCoy was acting within the scope of his civilian employment as a technician-caretaker at the time of the accident.

A fair analysis of the evidence discloses that McCoy was flying either solely in his civilian air technician status or, as conceded by the United States, in a dual capacity (as a civilian air technician and as a military pilot) at the time of the accident (R. 79, 80, 118, 587, 588), that he was then doing the work of an air technician in a supervisory maintenance position (R. 70, 79, 80, 121, 137, 138, 139, 140); that McCoy was not in a flying training period at the time of the accident (R. 80, 121, 136, 146, 147, 152-153, 161-163, 167, 586, 587). In either situation under Maryland Law the United States would be liable.

It is clear also under Maryland law that a person may be an employee of two employers for a given act. In *Keitz v. National Paving & Contracting Company*, 214 Md. 479, 490, 491; 134 A. 2d 296, 301 (1957), the court said:

> "A person may be the servant of two masters, not joint employers, at one time as to one act, provided that the service to one does not involve abandonment of the service to the other. *Baur* v. *Calic*, 166 Md. 387, 171 A. 713; restatement of the Law of Agency, Sec. 26 . . ."

The issue of agency and master-servant and scope of employment is to be determined in this case in accordance with Maryland law. *Williams* v. *United States*, 350 U. S. 857. The Maryland law applicable to motor vehicles on land is made applicable to aircraft. Article I-A, section

10 of the Maryland Code (Appendix, A-15). The evidence that the United States owned the airplane operated by McCoy gave rise to a presumption under Maryland law that McCoy was the agent or servant of the United States, acting in the course of his employment by the United States at the time of the happening of the accident in question. There being no evidence to the contrary on the issue of agency in the case, the plaintiffs would be entitled to a verdict against the United States as a matter of law. Indeed, the only testimony on the issue of agency buttressed this important presumption to which the plaintiffs were entitled. McCoy and his superior, Kilkowski, who was also employed pursuant to Section 709, Title 32, U. S. Code, *testified* that at the time of the accident McCoy was performing the duties of his civilian employment by the United States.

The foregoing is reinforced by the various admissions of the United States previously adverted to.

Under Maryland law, there is a strong, although rebuttable presumption that the operator of a vehicle is the agent or servant of the owner thereof. *Keitz* v. *National Paving & Contracting Company*, 214 Md. 479, 134 A. 2d 296 (1957); *Fowser Fast Freight* v. *Simmont*, 196 Md. 584, 598, 78 A. 2d 178, 179 (1951); *Taylor* v. *Freeman*, 186 Md. 474, 47 A. 2d 500 (1946); *Pennsylvania R. R.* v. *Lord*, 159 Md. 518, 151 A. 400 (1930).

Under the law of Maryland, it is also presumed that the agent or servant was operating the vehicle within the scope of his employment. The presumption may also be rebutted. *Brown* v. *Bendix Aviation Corporation*, 187 Md. 613, 621, 622, 51 A. 2d 292, 296 (1947); *Erdman* v. *Horkheimer*, 169 Md. 204, 206, 207, 181 A. 221 (1935).

In *Safeway Trails, Inc.* v. *Smith*, 222 Md. 206, 159 A. 2d 823 (1960), the Court, in discussing the presumption of agency, stated, 159 A. 2d 828, 829:

> "We have consistently held that if the evidence to rebut the presumption of agency from ownership is controverted and is not conclusive, the jury must decide the issue. (Citations omitted.) It was pointed out in *Grier* v. *Rosenberg*, 213 Md. 248, 255, 131 A. 2d 737, 740, that whether the evidence in rebuttal of the presumption is so slight that it is insufficient for the consideration of the jury or so conclusive as to require a directed verdict for the defendant 'must depend upon, and be decided by, the facts developed in each individual case'."

See also *Scott* v. *James Gibbons Co.*, 192 Md. 319, 64 A. 2d 117 (1949).

In *Grier* v. *Rosenberg*, 213 Md. 248, 131 A. 2d 737 (1957), the decisive test, the Court stated, is whether the employer has the *right* to control and direct the servant in the performance of his work and in the manner in which the work is to be done, *not whether he exercised* that right. See also *Sun Cab Company* v. *Powell*, 196 Md. 572, 578, 77 A. 2d 783 (1951); *Charles Greeland and Sons, Inc.* v. *Couplin*, 211 Md. 160, 169, 170, 126 A. 2d 606 (1956).

C. The majority's finding that McCoy was engaged in a military "training flight", contradicts the findings of the district court below and in *Meyer* and is unsupported by the evidence.

But the majority below took the unusual step of making a new finding of fact that McCoy was acting solely in his military capacity as an officer of the Maryland Air National Guard and not in his civilian capacity. In setting aside the finding of the trial court on that issue of fact, Judge Smith took the position that he was not bound by Rule 52(a), Federal Rules of Civil Procedure, which provides that:

> "Finding of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The findings of fact of the trial court ordinarily will not be disturbed unless clearly erroneous. *International Boxing Club* v. *United States*, 358 U. S. 242, 252 (1958); *United States* v. *United Steelworkers of America*, 271 F. 2d 676, 3rd Cir. aff'd 361 U. S. 39 (1959).

However, Judge Smith held that Rule 52(a) was not "applicable on the present appeal" because the actions were submitted to the trial court on the record made "in the consolidated trial of related cases", in the District of Columbia, and the reviewing court was therefore (R. 723):

> "* * * in as good a position as was the trial court to evaluate the evidence, draw the inferences of which the evidence is reasonably susceptible, and decide the critical questions raised on this appeal."

In fact, the United States District Court for the District of Columbia was in the best position to evaluate the testimony of the witnesses because it was in that Court that the witnesses had appeared and testified. Rule 52(a) was binding on the District of Columbia Court of Appeals. It was no less binding on the Third Circuit Court of Appeals which was one step further removed from the trial.

D. The certification and adjudication by agencies of the United States as admissions against interest.

Although these admissions may not be conclusive as Judge Smith pointed out, it is nevertheless respectfully submitted that they were disregarded and that they are of sufficient strength and scope as to render even more questionable the contrary and new findings of fact made by the majority below.

Subsequent to the occurrence, Captain McCoy received benefits under the provisions of the Federal Employees' Compensation Act pursuant to certification by the U. S. Department of Labor. The act provides:

> "The United States shall pay compensation as hereinafter specified for the disability or death of an *employee* resulting from a personal injury sustained *while in the performance of his duty . . .*" 5 U. S. C. A. Sec. 751 (Emphasis supplied).

It should be noted that had McCoy been considered to have acted as a military member of the Maryland Air National Guard at the time of this occurrence, his remedy was benefits under 32 U. S. C. A. Sec. 319 which authorizes hospital and surgical benefits and basic pay and allowance during hospitalization for a member of the National Guard who is injured in line of duty while performing an aerial flight. But under the supervision of his superior, Col. Kilkowski, his compensation claim was made as a civil employee of the United States under 5 U. S. C. §751 (*supra*, p. 18).

Lt. Col. Irvin Ebaugh, United States Property and Fiscal Officer for the State of Maryland, a federal employee, processed the papers for Captain McCoy's compensation claim (R. 250-251). These forms were provided by the Department of Labor and used in all instances for technicians (R. 241). The McCoy claim was duly processed and approved by the U. S. Department of Labor (*supra*, p. 18).

The fact that the United States took an assignment from Captain McCoy (R. 227) also indicates that he was regarded by the United States as an employee of the Government at the time of the occurrence.

Donald A. Chalmers, the passenger in the T-33 who was killed, was also required to sign a release to the United

States prior to the flight (R. 689). Since the State of Maryland had sovereign immunity, the only purpose of such a release would be to negate liability on the part of the United States. The second sentence in the second paragraph of this release reads as follows:

> "It is further understood and agreed that this release, among other things, extends to and includes negligence, *faulty pilotage* and structural failure of the aircraft thereof." (Emphasis supplied.)

And there are the additional admissions by the United States in its briefs that McCoy was at least in part engaged in his civilian capacity at the time (*supra*, p. 20).

II.

Assuming, but not admitting, McCoy was engaged in some military duties at the time of the occurrence, the United States is nevertheless liable.

As was stated by Judge Staley in the dissenting opinion below (p. 732):

> ". . . On this question, historical and constitutional considerations as to the status of members of the National Guard are simply not relevant. For we are concerned with the status of Captain McCoy, not as a member of the National Guard, but as a civilian caretaker or air technician employed under 32 U. S. C. Sec. 709(a) 'to care for material, armament, and equipment of the Air National Guard * * *' which is property of the Federal Government."

Even if McCoy had been engaged in a dual role at the time, the ownership and control with respect to the use of

its plane, its fueling, operation and flight area were all exerted, specified and supplied by the United States and through its agency the United States Air Force, its officers and its published rules and regulations nevertheless establishes its *respondeat superior* liability under the FTCA.

The FTCA provides that the United States shall be liable "if a private person" would be liable to the claimant in accordance with the law of the place where the act or omission occurred, 28 U. S. C. §1346(b); and see *Gilroy* v. *United States*, 112 F. Supp. 664 (D. D. C. 1953), wherein the meaning to be given to the words, "private person," is discussed. See also *O'Toole* v. *United States*, *supra*, p. 42.

In the statement of facts herein, the position of the Air National Guard as a part of the U. S. Air Force structure and national defense organization was outlined. As Secretary of the Army Brucker, on May 10, 1960, advised the Committee on the Judiciary of the House of Representatives, H. Rept. 1928, 86th Cong. 2d Sess., p. 7:

> "Equipment such as jet aircraft, tanks, and heavy artillery, . . . would seldom if ever be useful in accomplishing a State mission."

It is hardly realistic to characterize the 104th fighter squadron as anything but a part of the national defense. The over-all purpose of the National Guard is to be a part of the defense forces of the United States as a whole 32 U. S. C. Sec. 102 (*supra*, p. 21).

The organization of the Air National Guard and the composition of its units is the same as that prescribed for the United States Air Force, subject, in times of peace, to such general exception as the Secretary of the Air Force may authorize, 32 U. S. C. Sec. 104(b). The organization may not be disbanded without the consent of the Presi-

dent of the United States, and the actual strength of such organization in commissioned officers and enlisted members may not be reduced below minimum strength prescribed by the President, 32 U. S. C. Sec. 104(f).

The National Guard Bureau, an agency of the United States acts for the Secretary of the Air Force in the supervision of the uniform training of the units to conform with procedures prescribed by the Secretary of the Air Force. The National Guard Bureau is located in the Pentagon, and its ranking officers are on active duty with the United States Air Force (Wilson, R. 309-310).

The Constitutional provision that the states shall have the authority to appoint commissioned officers in the National Guard is in practical, if not legal, effect, nominal. An applicant is interviewed by a board appointed by the Secretary of the Air Force, and if found satisfactory, his application is processed through the National Guard Bureau of the Secretary of the Air Force from whom he receives his Air National Guard of the United States appointment and his federal recognition, (Wilson, R. 288-289), and is thereafter subject to federal approval (R. 300). Delegation of authority does not mean surrender of authority. Nor does lip service alter the fact that the real ownership, control and financing down to the last detail is in the United States.

In *Layne* v. *U. S.*, 295 F. 2d 433 (7th Cir. 1961, cert. den. 368 U. S. 990), it was held that a member of the National Guard, not a caretaker, killed while solely on a military training mission as part of a unit which had not been activated, was an employee of the United States. However recovery was denied on the ground that a serviceman cannot recover damages from the government for injuries which are incidental to the service. See also: *U. S. ex rel Gillett*

v. *Dern*, 74 F. 2d 485 (D. C. Cir. 1934). See *Holly, supra*, p. 38.

In *United States ex rel Gillett* v. *Dern*, 74 Fed. 2d 485, a U. S. Army veteran already receiving a U. S. Military pension sought additional benefits from the United States by means of his membership in the New York National Guard. The Court held that these benefits were in effect mutually exclusive since they were made alternative, both coming from the same source. As a consequence of Gillett having elected not to surrender his federal pension, the Secretary of War withdrew his federal recognition as a National Guard officer. The Court recognized that this meant effective termination of Gillett's status as an officer of the National Guard by the federal government, which was held to be within its powers (p. 488):

> "If it happens that by reason of that action he is embarrassed in or prevented from performing his duties as a National Guard officer, the fact in either case flows from the exercise of a power which is not subject to challenge here."

The source of federal power is clearly stated in the Constitution of the United States which provides in pertinent part:

> "Art. I, Sec. 8. The Congress shall have Power
> * * *
> To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; * * *"

In any event there is no constitutional provision with respect to caretakers of federal property.

III.

The prior *Meyer* decision operated as a collateral estoppel.

The Doctrine of Collateral Estoppel, it is respectfully submitted, should be considered by this Court as applicable against the government here. In the *Meyer* companion case (decided by the District of Columbia Court of Appeals, June 13, 1963), judgments on the common issue of liability became final when the U. S. Supreme Court denied certiorari on December 16, 1963.

In each instance a copy of the *Meyer* decision was immediately filed with the Court by plaintiffs in connection with the appeal below. It is respectfully submitted that the government became collaterally estopped on the issue of liability by the final judgment in the *Meyer* case several months before the decision below. In *United States of America* v. *Willard Tablet Co.*, 141 F. 2d 141, 144 (C. A. 7, 1944) the court said: "The doctrine of res adjudicata is not dependent upon mutuality of estoppel by Judgment, as contended by the government." See also *Coca-Cola Co.* v. *Pepsi-Cola Co.*, 172 A. 260, 36 Del. 120 (1934); 30A Am. Jur. Sec. 393, p. 444; *The City of Lincoln*, 25 Fed. 835, 843 (S. D. N. Y. 1885).

Public policy favors an end to litigation, particularly where as here, the United States has had its full and complete day in court and exactly the same facts and issues have been completely litigated and decided against it in the District of Columbia. It is respectfully submitted that the United States is as bound by the *Meyer* decision in the *Levin* cases as though such facts and issues have been physically tried in the *Levin* case. In fact it did not

matter at any time within the issues herein who the nominal plaintiffs were. For all practical purposes the plaintiffs could be nameless or faceless. Article IV, Section 1 of the United States Constitution; *Davis* v. *Davis*, 305 U. S. 321; *Chicago Life Insurance Co.* v. *Cherry*, 244 U. S. 25; *Baldwin* v. *Iowa State Travelling Mens Ass'n.*, 283 U. S. 522.

Conclusion.

It is respectfully submitted that the "circumstances" are such that the "United States", like "a private person" is liable pursuant to the FTCA under the law of Maryland "where the act occurred." McCoy was employed, supervised and controlled by the United States under the federal caretaker statute, Section 709, and subsidiary federal regulations, as a federally trained air technician to maintain aircraft owned and maintained by the United States as part of its national defense. Add to this the strong and unrebutted *respondeat superior* presumptions of the law of Maryland, the supporting structure of basic facts and that the defendant offered no evidence of any substance to the contrary.

The conclusion is compelling that at the time of the accident, McCoy was a civilian employee of the United States acting within the scope of his employment as a civilian maintenance technician and that he operated the subject aircraft within the scope of such employment.

The judgments of the Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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Pertinent Provisions of the Federal Tort Claims Act.

(Title 28, United States Code):

§ 1346. *United States as defendant.*

"(b) Subject to the provisions of chapter 171 of this title, the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

§ 2671. *Definitions.*

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term . . .

". . . 'Employees of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation."

National Guard, 32 U. S. C. (Pertinent Provisions).

SECTION 102. *General policy.*

In accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defenses of the United States be maintained and assured at all times.

National Guard, 32 U. S. C. (Pertinent Provisions).

Whenever Congress determines that more units and organizations are needed for the national security than are in the regular components of the ground and air forces, the Army National Guard of the United States and the Air National Guard of the United States, or such parts of them as are needed, together with such units of other reserve components as are necessary for a balanced force, shall be ordered to active Federal duty and retained as long as so needed. Aug. 10, 1956, c. 1041, 70A Stat. 597.

SECTION 314. *Adjutants General.*

(d) The adjutant general of each State and Territory, Puerto Rico, the Canal Zone, and the District of Columbia, and officers of the National Guard, shall make such returns and reports as the Secretary of the Army or the Secretary of the Air Force may prescribe and shall make those returns and reports to the Secretary concerned or to any officer designated by him. Each Secretary shall send with his annual report to Congress an abstract of the returns and reports of the adjutants general and such comments as he considers necessary for the information of Congress. Aug. 10, 1956, c. 1041, 70A Stat. 604; Sept. 2, 1958, Pub. L. 85-894, 72 Stat. 1713.

SECTION 318. *Compensation for disablement during training.*

A member of the National Guard is entitled to the hospital benefits, pay and allowances, pensions, and other compensation provided by law or regulation for a member of the Regular Army or the Regular Air Force, as the case may be, of corresponding grade and length of service, whenever he is called or ordered to perform training under section 502, 503, 504, or 505 of this title—

(1) for a period of more than 30 days, and is disabled in line of duty from disease while so employed; or

(2) for any period of time, and is disabled in line of duty from injury while so employed. Aug. 10, 1956, c. 1041, 70A Stat. 605; Sept. 2, 1958, Pub. L. 85-861, Sec. 33(c)(1), 72 Stat. 1567.

SECTION 501. *Training generally.*

(a) The discipline, including training, of the Army National Guard shall conform to that of the Army. The discipline, including training, of the Air National Guard shall conform to that of the Air Force.

(b) The training of the National Guard shall be conducted by the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia in conformity with this title. Aug. 10, 1956, c. 1041, 70A Stat. 609.

SECTION 710. *Reports of survey.*

(a) All military property issued by the United States to the National Guard remains the property of the United States.

(b) If property issued to the National Guard is lost, damaged, or destroyed, or becomes unserviceable or unsuitable, a survey of the circumstances thereof shall be made by a disinterested commissioned officer of the Regular Army or the Army National Guard detailed by the Secretary of the Army, or by a disinterested commissioned officer of the Regular Air Force or the Air National Guard detailed by the Secretary of the Air Force, as the case may be. The report of the surveying officer shall be sent to the Secretary concerned or to an officer designated by him to receive those reports.

(c) The Secretary concerned or his designated representative may relieve the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned, of further accountability and pecuniary liability for the property. However, if it was lost, damaged, or

destroyed through negligence, the money value of the property or the damage thereto shall be charged (1) to the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned, to be paid from its funds or from any non-Federal funds; or (2) to the member to whom the loss, damage, or destruction is charged from pay due him for duties performed in his status as a member of the National Guard.

(d) If property surveyed under this section is found to be unserviceable or unsuitable, the Secretary concerned or his designated representative shall direct its disposition by sale or otherwise. The proceeds of the following under this subsection shall be deposited in the Treasury under section 725c(b)(22) of title 31:

(1) A sale.

(2) A stoppage against a member of the National Guard.

(3) A collection from a person, or from a State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, to reimburse the United States for the loss or destruction of, or damage to, the property.

(e) If a State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned, neglects or refuses to pay for the loss or destruction of, or damage to, property charged against it under subsection (c), the Secretary concerned may bar it from receiving any part of appropriations for the Army National Guard or the Air National Guard, as the case may be, until the payment is made.

(f) Instead of the procedure prescribed by subsections (b)(d), property issued to the National Guard that becomes unserviceable through fair wear and tear in service may, under regulations to be prescribed by the Secretary concerned, be sold or otherwise disposed of after an inspection,

and a finding of unserviceability because of that wear and tear, by a commissioned officer of the Regular Army or the Regular Air Force, as the case may be, designated by the Secretary. The State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned, is relieved of accountability for that property. Aug. 10, 1956, c. 1041, 70A Stat. 615; Sept. 2, 1958, Pub. L. 85-861, Sec. 33(c), 72 Stat. 1567.

Excerpts from Plaintiff's Exhibit 15, National Guard Regulations No. 75-16 (Dated December 29, 1947) (R. 634 to 645).

1. *Authority*: Accounting clerks and caretakers referred to in these regulations are employees authorized under the provision of section 90, National Defense Act, for the administration and care of material, armament, vehicles, and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army has delegated to the several adjutants general of States, Territories, and the District of Columbia, authority to employ, fix rates of pay, establish duties and work hours (not to exceed 40 hours per week), and to discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may from time to time be issued by the Chief, National Guard Bureau. (R. 635).

2. *Definitions*: The following definitions are applicable:

b. *Caretakers* (Army) are male, civilian employees authorized as supervisors, mechanics, and technicians. They may be divided into two main categories.

(1) *Unit Caretakers*: Employees who work directly under the supervision of a company or similar unit

commander and are responsible to that commander for the care, maintenance, and repair of the unit equipment.

(2) *Pool Maintenance Caretakers*: Employees who work in or from fixed shops, under the direction of shop or pool supervisors and under the general supervision of the State maintenance officer. They are responsible for the inspection, repair, and reconditioning of equipment pertaining to National Guard organizations (R. 635).

c. *Caretakers* (Air) are male civilian employees authorized by law for maintenance, repair, and inspection of equipment issued to the National Guard Air units.

3. *Number:* The number of accounting clerks and caretakers authorized to be paid from Federal funds in each State will be announced periodically by the Chief, National Guard Bureau. This number will be based on geographic considerations, troop strengths, the amount and types of equipment issued to the State, and upon funds made available for the National Guard. The number of personnel actually paid from Federal funds may exceed the total specified from time to time by the Chief, National Guard Bureau, if employment is on a part-time basis and funds allotted for each job are not exceeded (R. 636).

4b. *Caretakers (Army)*

(1) *Unit caretakers* must be members of the National Guard and of the unit for which employed. They must be qualified to perform maintenance, at the organization level, on the equipment for which the unit commander will be responsible. Such qualifications will be determined by appropriate aptitude tests (R. 636).

Excerpts from Plaintiff's Exhibit 15, National Guard Regulations No. 75-16 (Dated December 29, 1947) (R. 634 to 645).

c. Caretakers (Air) must be members of the National Guard and must be able to perform the duties specified for the particular job in AAF Manual 35-0-1 "Military Personnel, Classification and Duty Assignment," 3 April 1944 (as revised) or WD TM 12-427 "Military Occupational Classification of Enlisted Personnel," 12 July 1944 (as revised). However, they may be trained in additional duties as may be required by the unit commanders. Commissioned officers of the National Guard Air Units may be employed as caretakers only in the Military Occupational Specialty positions indicated in current chart for Permanent Caretaker Detachment, National Guard Air units (R. 637).

7d. Payrolls will be certified by the bonded United States property and disbursing officer and approved by the State adjutant general or an officer designated by him (R. 639).

CHANGE No. 1

NGR 75-16, 29 December, 1947, is changed as follows:

Authority: Accounting clerks and caretakers referred to in these regulations are employees authorized under the provisions of Section 90, National Defense Act, for the administration and care of materiel, armament, vehicles and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army had delegated to the several adjutants general of States, Territories and the District of Columbia, authority to employ, fix rates of pay, establish duties and work hours, and to discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may from time to time be issued by the Chief, National Guard Bureau (R. 646).

Excerpts from Plaintiff's Exhibit 16, National Guard Regulations No. 75-16, Dated January 7, 1953 (R. 647).

1. *Purpose*: The purpose of these regulations is to outline the qualifications, duties, rights and obligations of the following personnel. (hereinafter referred to collectively as "National Guard Civilian personnel"): administrative assistants; accounting clerks; maintenance personnel; rangekeepers; and administrative, supply and maintenance technicians, and to prescribe the procedure for the payment of these individuals.

2. *Authority*: National Guard civilian personnel referred to in these regulations are employees authorized under the provisions of Section 90, National Defense Act, for administrative and accounting duties, maintenance repair and inspection of materiel, armament, vehicles and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army has delegated to the adjutants general of the several States, Territories, Puerto Rico, and the District of Columbia, the authority to employ, fix rates of pay, establish duties and work hours (a minimum of 40 hours per week), supervise and discharge employees within the purview of these regulations; subject to the provisions of law and such instructions as may from time to time be issued by the Chief, National Guard Bureau. (32 U. S. C. A. 42 and 42a; G. O. No. 96, Dept. of the Army, [illegible] Nov. 51).

3. *Definitions:* a. Administrative assistants are federally recognized officers, warrant officers or enlisted men employed as civilians to act as civilian administrative assistants to commanders in the performance of such duties, responsibilities and administrative matters for which the commanders are responsible, or may be required to perform (R. 648-649).

Plaintiff's Exhibit 17, ANGR 40-01 (R. 652).

SECTION I—*General.*

1. *Purpose*: This Regulation provides a manning guide for the Air National Guard civilian personnel program and establishes policies and procedures applicable to Air National Guard civilian personnel (R. 656).

2. *Policy*: a. Air National Guard civilian personnel shall be utilized to effect maximum efficiency in administration, supply, operations, training, and maintenance of the Air National Guard.

b. Air National Guard civilian personnel must be federally recognized members of the Air National Guard of the State, Territory, Puerto Rico, or the District of Columbia except for the employment of:

(1) Females (when specifically authorized by the Chief, National Guard Bureau).

(2) Temporary personnel paid from funds other than those designated for the pay of air technicians.

e. Airmen type air technician positions may be transferred to other units or organizations, or the position may be changed to another authorized position at the discretion of the State adjutant general, except that such positions may not be transferred to or from Headquarters, State Air National Guard without prior approval of the Chief, National Guard Bureau.

f. Officer type air technicians positions may not be transferred or changed without prior approval of the Chief, National Guard Bureau (R. 657).

h. Air National Guard civilian personnel may not accept outside employment which interferes or conflicts with the performance of their Air National Guard civilian duties.

k. Officers required to meet a Federal recognition board should not be employed prior to receipt of Federal recog-

nition, and any individual if so employed accepts such employment at his own risk. Officers exempted from meeting a Federal recognition board may be employed and paid from the date the individual is appointed. Airmen may be employed upon completion of the oaths of enlistment.

1. The authority governing matters pertaining to Air National Guard civilian personnel is contained in this regulation and will be quoted as reference in specal orders and other official action.

3. *Authority*

a. Basic authority for the employment of Air National Guard civilian personnel is contained in Section 90, National Defense Act, as amended.

b. Authority is delegated to the adjutants general of the several States, Territories, Puerto Rico, and the District of Columbia, to employ, fix rates of pay, establish work hours (a minimum of 40 hours per week) supervise and discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may be subsequently issued by the Chief, National Guard Bureau (R. 658).

5. *Definitions*: For the purpose of this Regulation:

a. "Air National Guard civilian personnel" means any and all civilians employed by the several States, Territories, Puerto Rico, and the District of Columbia, permanent or temporary, male or female, supported wholly or in part by Federal funds appropriated for that purpose, including but not limited to the following:

(1) Air technicians means a person employed for the performance of the duties of positions listed on the manning guide and paid from funds designated for the pay of air technicians (R. 659).

Excerpts from Plaintiff's Exhibit 3 (R. 210).

AIR NATIONAL GUARD MANUAL (ANGM 40-01)

CIVILIAN PERSONNEL MANUAL

1 March 1958

Department of the Air Force—National Guard Bureau
ANG Manual 40-01
Department of the Air Force
Washington, 1 March 1958

FOREWORD

The Air National Guard Civilian Personnel Manual is issued to provide staff and operating personnel with a convenient reference to the titles, grade, job number and duties of civilian personnel in the Air National Guard. Provisions are also included for the submission of recommendations for new or revised positions, grades and titles.

Provisions of this manual will govern all Air National Guard civilian employees, including those employed on a temporary hourly rate basis except those hired wholly from State or service contract funds, and will become effective as of 1 April 1958.

All Air National Guard civilian personnel will be permitted access to the contents of this manual and will be fully acquainted with the duties and responsibilities of their positions.

Recommendations or suggestions for the improvement of procedures or position descriptions of this manual are encouraged. Comments may be forwarded to National Guard Bureau, NG-AFOTP, Washington, D. C.

BY ORDER OF THE SECRETARY OF THE AIR FORCE:

EDGAR C. ERICKSON
Major General
Chief, National Guard Bureau

OFFICIAL:

JAMES E. BARBER
Colonel, NGB
Executive

Excerpts from Plaintiff's Exhibit 3 (R. 210).

DISTRIBUTION:

1 ea AG

1 ea USP&FO

4 ea Flying Detach

1 ea Non-Flying Detach

The listing below is in numerical order according to job numbers. The status indicates the position can be occupied by Officer (O), Warrant Officer (WO),* Airman (A), Female (F), and Non-Guardsman (X). The job title and career field title indicate the technician job title and corresponding Air Force career field and title. These are the new position numbers and titles; for the conversion see Section II, Paragraph 12.

MAINTENANCE SUPERVISOR

Grade: NGC-11

Job Number: 43-00

1. NATURE AND PURPOSE OF WORK:

A. *Introduction:*

The position is located in the Maintenance Division of an Air Technician Detachment. The incumbent is responsible for coordination, supervision and control within the maintenance division for aircraft maintenance, (field and organizational type), electronics, motor vehicle and support equipment. Incumbent will maintain proper administrative practices when carrying out his responsibilities, using all accepted management principles.

* An airman who is appointed warrant officer may be retained in his airman type position. A warrant officer will not be hired direct into airman type positions except into the position of Aircraft Maintenance Chief, Job Number 43-10.

Excerpts from Defendant's Exhibit 9. ANGR 50-01 (R. 671).

1. Training authority: The requirements to be met and the sources of authority for the training and instruction of the Air National Guard not in Federal service are set forth in the following:

a. Sections 5, 91, 92, 93, 94, 96, 97, and 99, National Defense Act, as amended, and Sections 201 and 501, Public Law 351, 81st Congress, hereafter referred to as Career Compensation Act of 1949.

b. Air National Guard Regulations.

c. The policies of the Department of the Air Force.

d. The orders, instruction, and training announcements issued by the Chief of Staff, United States Air Force pursuant to authority specifically delegated to him by the Secretary of the Air Force.

e. The orders and detailed instructions promulgated by the Chief, National Guard Bureau to the Air National Guard not in Federal service with the approval of the Chief of Staff, United States Air Force, in amplification of, and to make effective, the policies indicated in c above.

2. National Guard Bureau Instructions. The Chief, National Guard Bureau is charged with promulgating to the Air National Guard not in Federal Service, from time to time, the necessary orders and instructions to make effective the Department of the Air Force training policies.

a. The training of the Air National Guard will conform to the Department of the Air Force policies and directives as prescribed for the Regular Air Force.

b. It will be conducted by the Air National Guard organizations of the respective States under the supervi-

sion of the commanding generals of the appropriate major forces, in accordance with the policies prescribed by the Department of the Air Force. Such supervision will be exercised by:

1. Preparation of training directives.

2. Supervision of United States Air Force Instructors.

3. Authority to conduct inspections.

4. Conduct of tests.

5. Furnishing the Department of the Air Force with appropriate reports on state of training and recommendations for necessary remedial actions (R. 671-673).

Federal Employees Compensation Act, 5 United States Code 751.

Disability or death of employee: willful misconduct. The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death. (Sept. 7, 1916, c. 457, Sec. 1, 39 Stat. 742.)

Annotated Code of Maryland, 1951, Article 1A, sec. 10 (Collision of Aircraft).

The liability of the owner of one aircraft to the owner of another aircraft, or to airmen or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.

Annotated Code of Maryland—Article 65.

SEC. 11. *As Quartermaster General.*

The ranking line officer, as Quartermaster General, shall be responsible to the Governor for the care, preservation and safekeeping of all military property. He shall prepare returns of all federal military property at the time and in the manner prescribed by the Secretary of War (Secretary of the Army). He shall keep a just and true account of all expenses incurred in the upkeep of the militia and such expenses shall be audited and paid in the manner provided by law. He shall make such purchases and issue such military property as the Governor may direct. (An. Code, 1951, Sec. 11; 1939, Sec. 11; 1924, Sec. 11; 1922, ch. 490, Sec. 10; 1931, ch. 161, Sec. 11.)

SEC. 15. *National Guard:*

(b) *Of what organizations and persons National Guard shall consist.* The Army National Guard of Maryland and the Air National Guard of Maryland shall consist of those units and organizations of the organized militia allocated to the State of Maryland by the Department of Defense and supported, in whole or in part, by federal funds; and such persons as shall, with the approval of the Governor, be transferred by federal authorities for the completion of the reserve service obligation imposed upon them by federal law. Persons so transferred shall be considered members of the Army National Guard or Air National Guard, as appropriate, irrespective of whether they have executed the oath prescribed by Sec. 25.

Maryland State Guard.

SEC. 62. *Authority and name.*

Whenever any part of the National Guard of this State is in active federal service, the Governor is hereby authorized to organize and maintain within this State during such period, under such regulations as the Secretary of War (Secretary of the Army) may prescribe for the organization, standards of training, instruction and discipline, such military forces as the Governor may deem necessary; and the Governor is authorized to reduce the number of or disband such forces at any time assigned, and such able-bodied male citizens of the State, and able-bodied males of foreign birth who have declared their intentions to become citizens, resident in the State, as shall volunteer for service therein. Such forces shall be additional to and distinct from the National Guard, and shall be known as the "Maryland State Guard." Such forces shall be uniformed as the Governor may prescribe. (An. Code, 1951, Sec. 59; 1943, ch. 410, Sec. 58A.)